Award No. 3875

Docket No. 3898

2-ACL-EW-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, AFL — CIO. (Electrical Workers)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Atlantic Coast Line Railroad Company violated the current agreement by contracting out to outside industry, the Otis Elevator Company, the electrical wiring of an elevator located at Waycross Shops, during the period between September 2 and September 30, 1959.

2. That accordingly the Atlantic Coast Line Railroad Company be ordered to additionally compensate an electrician and an electrician helper assigned to this particular type of work, 80 hours, or 10 days pay each, at the pro rata rate of pay, which is equal to the number of hours worked by the Otis Elevator Company employes.

STATEMENT OF FACTS: The Atlantic Coast Line Railroad Company, hereinafter referred to as the carrier, regularly employes electrical workers assigned to the installation and maintenance and repair of electrical equipment at the Waycross Shops. Electrician J. D. Woodard, Electrician J. A. Gorday, and Electrician Helper R. J. Williamson were assigned to the maintenance and repair of electrical equipment at Waycross during the period of September 2 to September 30, 1959, inclusive.

Electrician J. D. Woodard and Electrician Helper R. J. Williamson were assigned by the carrier to completely rewire the laboratory building at the Waycross Shops, installing new lighting fixtures, new air-conditioner unit, new machinery and a one (1) ton hoist, and new power supply and cut off switch for elevator.

During the period of September 2 to September 30, 1959, inclusive, the Otis Elevator Company rewired the elevator located in the laboratory building at Waycross Shops, the same building mentioned in the above paragraph.

had no previous experience." (Opinion of Board in Third Division Award No. 4712.) The propriety of contracting out work when special skills and know-how are required or where the work is unusual or novel in character has been recognized by the National Railroad Adjustment Board in Third Division awards 2338, 2465, 3206 and 4712.

The modernization of this elevator is specialized construction, and has never been attempted by this carrier. Because of this fact and other circumstances enumerated above, carrier acted in complete propriety and exercise of managerial judgment in contracting the work as a "lock key" job to outside parties.

The carrier's position respecting this work is expressed by the following language of Referee Carmody in Third Division Award 4712:

> "To insist that the Carrier had no right to buy or contract for the installation of this first car retarder system on its property from a responsible, experienced manufacturer, under the circumstances set forth in this record, would be equivalent, in our considered judgment, to telling it not only how to organize its engineering, design, research, and other supervisory services, but to deny it access to operating guarantees its own employes, only acquiring skill in this special field as the work progressed, could not reasonably be expected to give, whether they were engineers or signalmen technically proficient in the work they are accustomed to do.
>
> We conclude on the whole record that inasmuch as neither any of its officials nor employes covered by the Signalmen's Agreement had had any previous experience with the installation or the operation of the car retarder system here involved, or any similar system, the Carrier was justified on the basis of prudence and good judgment, in transferring the risk to an experienced, responsible manufacturer for the first installation of a car retarder system on its property."

Your Board, in denying a somewhat similar claim in Award No. 2186, stated in part:

> "In this respect, it is the opinion of the Board that the project should be treated as a whole in determining whether a proper basis existed for the contracting of the work. A carrier is not required to split up work and contract a part and retain a part for its employes to perform where the whole project is of such a nature as to warrant the carrier, in a reasonable exercise of its managerial judgment, to contract the work. Awards 4954, 5304, 5563, Third Division."

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This dispute arises out of the assignment of electrical rewiring to employes of an outside contractor (Otis Elevator Company) instead of to the Carrier's electricians. The work was performed in connection with the modernization of an elevator in a building owned by the Carrier at Waycross, Georgia.

The rule is well established that work coming within the scope of the applicable labor agreement cannot, as a matter of principle, be contracted out by the carrier, unless such work is specifically excepted in the agreement. See Second Division Awards 1439, 1559, 2956, and 3177. On the other hand, this and other Divisions of this Board have sustained a carrier's right to contract out such work when all the circumstances surrounding the case at hand clearly demonstrate that it obviously would be unreasonable or inequitable to have the work performed by employes included in the bargaining unit. See Awards of this Division 1803, 2186, and 3457; and of the Third Division 757, 2338, 5090, and 7841. However, the Divisions have evolved no pat, broadgauged statement of applicable principles to govern all cases of permissible exceptions recognized by them in the interest of reasonableness and equity. Each case must be adjudicated on the basis of its specific facts. Yet, it should be noted that definite proof will be required to justify an exception from the general rule which is not expressly sanctioned by the labor agreement. Otherwise, a trend could conceivably develop which would eventually deprive the agreement of its vitality.

In applying the above principles to the facts underlying the instant case, the Division has reached the following conclusions:

The rewiring here in dispute is covered by Rule 502 and Appendix XXI of the agreement which are not expressly limited or qualified by other rules or Appendices. Thus, it should have been performed by the Carrier's electricians in accordance with Rule 27(a), unless the Carrier has shown beyond a doubt that it would have been grossly unreasonable to have it performed by them. For the reasons hereinafter stated, we are satisfied that the Carrier has made such a showing.

First, the rewiring in question did not involve the repair or maintenance of an existing installation. It was performed in the course of a highly technical modernization project, namely, a change from a manually operated elevator to one operated by automatic pushbuttons, which required specific ability, experience, and skill. Since the record does not show that such work was ever performed by the Carrier's electricians, we are unable to find that they had the necessary experience and skill to perform it competently. As a result, the Carrier did not act arbitrarily, capriciously or discriminatorily when it contracted out said work to the Otis Elevator Company.

Second, all rewiring under consideration was performed within the shaft or the elevator cage (Carrier Exhibit No. 10.) It was, therefore, an inseparable part of a series of coordinated and integrated operations which could not be reasonably segregated without creating a real danger of adversely affecting the safe and efficient completion of the whole project. Hence, the Carrier had good and valid reasons to contract out the entire installation.

Third, it appears from the record before us that the Otis Elevator Company, a leading maker of elevators, would not have undertaken the mechanical and engineering work of changing the manually operated elevator to one operated by automatic pushbuttons, unless it could have used its own specialized and experienced personnel (Carrier Exhibit No. 7). Consequently, the Carrier had, for all practical purposes, no choice but to contract out the whole project.

Under all the above facts and circumstances, we hold that the rewiring in question was excepted from the agreement and, therefore, could legitimately be performed by the employes of the Otis Elevator Company instead of by the Carrier's electricians.

Since we have denied the instant claim on its merits, it becomes unnecessary to rule on the Carrier's procedural objection and we express no opinion on the validity thereof.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November, 1961.

DISSENT OF LABOR MEMBERS TO AWARD 3875

The majority found that the work in dispute was work covered by the agreement and that it should have been performed by the carrier's electricians as the following appears in their findings:

> "The rewiring here in dispute is covered by Rule 502 and Appendix XXI of the agreement which are not expressly limited or qualified by other Rules or Appendices. Thus, it should have been performed by the Carrier's electricians in accordance with Rule 27(a) * * *"

This Board cannot make or amend agreements. It is bound by the agreement between the parties. In this dispute the majority found that the agreement was violated. There being no exceptions, this Board is required to enforce the existing agreement in accord with Section 2, First of the Railway Labor Act.

/s/ **E. J. McDermott**
E. J. McDermott

/s/ **C. E. Bagwell**
C. E. Bagwell

/s/ **T. E. Losey**
T. E. Losey

/s/ **E. W. Wiesner**
E. W. Wiesner

/s/ **James B. Zink**
James B. Zink